

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: WILSON'S ORCHARD	DOCKET NO. WRU-00-20
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ORDER GRANTING REQUEST FOR WAIVER OF 199 IAC 22.3(14)

(Issued December 20, 2000)

On April 3, 2000, Wilson's Orchard, a business located just east of Iowa City, Iowa, filed with the Utilities Board (Board) a request for "a waiver from the rules that require our farm to have phone service with Liberty Communications." The petitioner summarized the facts as follows.

Petitioner's business is an apple orchard on 83 acres petitioner purchased in April of 1980. The orchard is located 1½ miles from the current city limits of Iowa City and approximately 7 miles from West Branch, Iowa. In 1982 or 1983, petitioner ordered telephone service from U S WEST Communications, Inc., n/k/a Qwest Corporation (Qwest), out of the Iowa City exchange. Petitioner believed this to be the appropriate exchange; the orchard has an Iowa City address and considers itself to be an Iowa City business. However, petitioner's orchard is actually located just across the road from Qwest's Iowa City exchange, in the service territory assigned to what was then West Branch Telephone Company, now known as Liberty Communications (Liberty).

Because Qwest did not have any nearby facilities, petitioner was required to pay a facilities extension charge of approximately \$350 to Qwest before service could be commenced. The construction charges were paid and petitioner received regular business line service from Qwest until 1988.

When Liberty became aware of this situation in the summer of 1988, Liberty required petitioner to take service from Liberty, pursuant to Board rules and Liberty's tariff provisions relating to adjacent exchange service. That tariff requires that a customer located in Liberty's service territory must take service from Liberty before the customer can purchase adjacent exchange service. Accordingly, Liberty trenched in a new telephone line (at a charge to petitioner of approximately \$400) and commenced providing local exchange service to petitioner.

Since 1988, the orchard has purchased local exchange service from Liberty and adjacent exchange service from Qwest. Liberty bills the orchard both for its own service and for Qwest's adjacent exchange service. The orchard states this arrangement is more costly than having a single service line from Qwest's Iowa City exchange, by approximately \$70 per month. Petitioner asserts that during the last 11 years it has paid over \$9,000 to Liberty for service it does not want in order to maintain direct local service from Qwest's Iowa City exchange.

Petitioner now requests a waiver of the Board rules that permit Liberty to enforce its tariff provisions relating to adjacent exchange service, so that petitioner will only have to purchase the service it desires.

RELEVANT LEGAL AUTHORITIES

Iowa Code § 476.29 provides that local exchange carriers must have a certificate of public convenience and necessity before they may provide service in Iowa. Subsection (4) of that statute provides that the certificate must define the service territory that will be served by the carrier. This requirement is intended to assure that all territory in the state is served by at least one local exchange service provider, see § 476.29(11). However, local exchange service territories are not exclusive and do not prevent the Board from adopting rules regarding adjacent exchange service, see §§ 476.29(12) and (14).

The Board has adopted rules providing for adjacent exchange service.

199 IAC 22.3(14) provides:

Adjacent exchange service. All local exchange utilities shall file tariffs which include provisions which allow customers to establish adjacent exchange service.

a. The tariffs shall require the customer to pay the full cost of establishing and maintaining the adjacent exchange service.

b. In addition, the tariffs may include all or part of the following service provisions:

(1) The subscriber shall subscribe to local exchange service in the primary exchange in addition to adjacent exchange service.

(2) All toll messages shall be placed through the primary exchange, unless there is a service outage in that exchange.

(3) The primary exchange company shall bill for the adjacent exchange service and make appropriate settlement to the secondary exchange company, unless the primary exchange and the adjacent exchange agree to a different billing arrangement.

(4) Adjacent exchange service shall be restricted to only the residential class of service, unless a waiver is permitted by the board for a particular customer for good cause shown.

(5) Failure of the subscriber to comply with the tariff provisions related to adjacent exchange service shall make the subscriber subject to discontinuance of service after appropriate notice.

c. These adjacent exchange service rules shall not affect the terms under which a customer receives adjacent exchange service, if that customer was receiving adjacent exchange service prior to the effective date of these rules.

Thus, the rule *requires* that all local exchange carriers offer adjacent exchange service; the rule *permits* tariff provisions intended to protect the revenue stream of the primary exchange company; and the rule grandfathers the service arrangements of customers who were receiving adjacent exchange service when the rules became effective (which was prior to any of the events relevant to this docket).

The Board's general waiver rule is 199 IAC 1.3, which provides for a waiver of a rule if the Board finds: (a) application of the rule would pose an undue hardship on the person for whom the waiver is requested; (b) the waiver would not prejudice the substantial legal rights of any person; (c) the provisions of the rule are not specifically mandated by statute or other rule of law; and (d) substantially equal protection of the public health, safety, and welfare will be afforded by a means other than that prescribed in the rule. Similarly, 199 IAC 22.1(2) provides that the Board may waive any of its telephone utility regulations if "unreasonable hardship" to a telephone utility or a customer would result from application of any rule in 199 IAC 22.

THE LIBERTY TARIFF

Pursuant to the Board's rule, Liberty has implemented tariff provisions for adjacent exchange service. The adjacent exchange service provisions can be found at Part V, Second Revised Sheet 22, of Liberty's tariff. Those provisions require that a customer subscribe to Liberty's service before the customer is eligible for adjacent exchange service. The tariff also limits the availability of the service to residential customers and requires that all toll calls be placed through Liberty's exchange service (unless it is out of service). Each of these provisions is expressly permitted, but not required, under the Board's rules.

ANALYSIS

1. Will application of the rule result in undue hardship to petitioner?

The first question the Board must consider is whether application of the rule will result in undue and unreasonable hardship to the petitioner. (While the two waiver rules (1.3 and 22.1(2)) use slightly different language in describing the required degree of hardship, the Board finds for purposes of this ruling that the adjectives "undue" and "unreasonable" should be considered synonyms, meaning an improper or harmful hardship.) Based upon the petitioner's allegations, the Board finds that continued application of the rule, and Liberty's tariff provisions adopted pursuant to the rule, will result in undue hardship to Wilson's Orchard.

Petitioner originally ordered local exchange service from the Iowa City exchange based upon a reasonable belief that petitioner, as an Iowa City business

with an Iowa City address, should be served out of Iowa City. It was not petitioner's responsibility to determine the service territory boundaries of the local exchange carriers and order service from the correct carrier; it is not realistic to expect all telephone customers to know the precise extent of each telephone exchange. Thus, through no fault of petitioner's, the orchard has been required to purchase service it does not want in order to obtain the service it needs. In these circumstances, where the orchard's original business plan might have been different if it had known of the telephone service arrangements available to it, having to purchase primary exchange service is an undue hardship.

For example, if the local exchange carriers had informed the orchard of the service territory requirements in 1983, before petitioner paid for installation of the Iowa City line, petitioner might have constructed its business plan around a toll-free telephone number or made other arrangements for marketing its produce in Iowa City. Petitioner did not make those arrangements because the orchard thought it could purchase regular local exchange service from the Iowa City exchange. Petitioner should not now be required to pay the costs associated with the local exchange carrier's error.

Normally, the Board does not alter local exchange service territory boundaries on the basis of a single customer's preference for service from another carrier. Iowa Code § 476.29(10) establishes a high standard for mandatory realignment of boundaries, requiring a petition signed by at least 80 percent of the subscribers to

initiate such a change. This reflects the relatively high costs that can be associated with changing service territory boundaries; as a general matter, such changes should not be implemented on the basis of what may be short-term customers' preferences.

However, petitioner's situation is unusual. Petitioner's first local exchange service was from the preferred exchange, and petitioner paid the cost of installing that service. Had the orchard requested this waiver in 1988, when Liberty first required purchase of its service, efficiency would have supported a decision to grandfather the orchard's pre-1988 arrangement. In fact, the Iowa statutes recognize this approach in § 476.29(12)"a," which would have grandfathered the orchard's Qwest service arrangement if it had existed on September 30, 1992, when § 476.29 was amended to its current form.

Thus, petitioner's present dilemma is largely a result of a mistake by the local exchange carrier in providing service in the first place and unfortunate timing. If this waiver had been requested before Liberty's service was installed in 1988, or if Liberty's service had not been installed until after September 30, 1992, petitioner may well have the desired service arrangement, either by waiver or by statute. While the timing of a request is often a matter of great legal significance, the Board finds it should not be controlling in this case, where this situation originates from no mistake or other action on the part of petitioner.

The Board finds that continued enforcement of 199 IAC 22.3(14)"b" would work an undue and unreasonable hardship on petitioner.

2. Will the waiver prejudice the substantial legal rights of any other person?

The second factor the Board must consider is whether a waiver of 199 IAC 22.3(14)"b" will prejudice the substantial legal rights of any other person. Initially, it would seem that waiving the rule (and the relevant Liberty tariff provisions) would prejudice Liberty's legal rights, since any decrease in payments by petitioner must be a decrease in revenue to Liberty. However, the Board finds that a closer examination of the facts leads to the conclusion that a waiver will not prejudice the substantial legal rights of any person.

First, in the absence of the rule, Liberty has no exclusive right to serve petitioner. Local exchange service territories are not exclusive, see § 476.29(12). At the same time, § 476.29(14) explicitly allows the Board to maintain adjacent exchange service rules that may affect the range of choice available to customers. Clearly, these statutes are inconsistent with the notion that Liberty has an exclusive right to serve petitioner.

Further, if petitioner's early service from Qwest had continued through September 30, 1992, the service would have been grandfathered by statute at the time that local exchange service territories were established, see § 476.29(12)"a." No argument has ever been made that this statute infringes on the substantial legal rights of any local exchange carrier; the statute demonstrates that grandfathering a customer's pre-existing service arrangement is consistent with the law and public policy.

Even if it were assumed that Liberty had some legal right to serve petitioner, regardless of the customer's preference, there would still be the question of whether that right would be substantially prejudiced by a waiver. The revenue at stake is not substantial to a telephone utility of any size, representing the price of a single business line. When the lost revenues are offset by the savings associated with no longer billing the customer, it is highly unlikely that the net decrease in Liberty's bottom line could be described as "substantial" in any meaningful sense of the word.

The Board finds that a waiver of 199 IAC 22.3(14)"b" for petitioner will not prejudice the substantial legal rights of any person.

3. Are the provisions of the rule legally mandated by any other provision of law?

The Board finds that there is no statute or other provision of law requiring that telephone utilities be permitted to include the relevant restrictions in their adjacent exchange service territory tariffs.

4. Will substantially equal protection of the public health, safety, and welfare be afforded by a means other than the rule for which a waiver is requested?

In the narrow and unusual circumstances of this case, waiver of the Board's rule permitting local exchange carriers to include restrictive adjacent exchange service provisions in their tariffs will not adversely affect the public health, safety, and welfare. Accordingly, the Board finds that a waiver of a rule that, in these particular circumstances, will provide equal protection of these important public interests.

CONCLUSION

The Board finds that each of the requirements of 199 IAC 1.3 is satisfied in the unique circumstances presented by petitioner. Accordingly, the Board will grant the petition for waiver filed by Wilson's Orchard on April 3, 2000, and waive the provisions of 199 IAC 22.3(14)"b" as applied to petitioner. The Board orders that Liberty shall not apply the provisions of Liberty's adjacent exchange service tariff that requires purchase and use of Liberty's service before customer may be eligible to purchase adjacent exchange service to Wilson's Orchard. Petitioner shall no longer be required to purchase local exchange service from Liberty Communications as a precondition of purchasing local exchange service from any provider serving the adjacent exchange, and petitioner shall be permitted to purchase Qwest's Iowa City local exchange service as if petitioner were located within the boundaries of the Iowa City exchange. In this way, the orchard's service will be returned to the status it had in the 1983 to 1988 time period.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The request for waiver filed on April 3, 2000, by Wilson's Orchard is granted, as described in the body of this order.
2. Pursuant to the waiver, the provisions of the adjacent exchange service territory tariff filed with the Board by Liberty Communications are not applicable to Wilson's Orchard. Wilson's Orchard shall no longer be required to purchase any

service from Liberty Communications as a precondition to purchase of local exchange service from the adjacent exchange.

UTILITIES BOARD

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Raymond K. Vawter, Jr. /s/ Diane Munns
Executive Secretary

Dated at Des Moines, Iowa, this 20th day of December, 2000.